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# UNSEEN HARMS: THE U.S.–MEXICO BORDER WALL AND ITS LESSONS FOR WILDLIFE AND BIODIVERSITY ADVOCATES

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On February 27, 2018, District Judge Gonzalo Curiel denied summary judgment to a group of plaintiffs that included the State of California and several environmental nonprofit groups.<sup>2</sup> Their lawsuit challenged the U.S. Department of Homeland Security (DHS) waivers of federal and state law in order to allow work on existing and new physical border wall structures around the border between the United States and Mexico.<sup>3</sup> Although recent discussions about the federal budget may make it seem that a potential physical border wall is still up for debate, in fact over one-third of the length of the border already has physical barriers of various kinds, and more are under preparation.<sup>4</sup> Authorization for these sections of wall exists under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, amended in 2005, 2006, and 2008.<sup>5</sup> These congressional statutes appear to authorize, without restriction, the suspension of the country's environmental laws,<sup>6</sup> allowing for construction of a border wall with significant effects on wildlife and biodiversity.

## THREATS TO WILDLIFE AND BIODIVERSITY

Some of the regions where walls have already been built or are proposed include areas of great biological significance.<sup>7</sup> Several species listed as endangered under federal law—including the Mexican gray wolf, the

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2. *In re Border Infrastructure Envtl. Litig.*, No. 17CV1215-GPC(WVG), 2018 WL 1071702, at \*1 (S.D. Cal. Feb. 27, 2018). Three cases were brought and consolidated, with the following plaintiffs: the State of California and the California Coastal Commission; the Center for Biological Diversity; and Defenders of Wildlife, Sierra Club, and Animal Legal Defense Fund.

3. *Id.*; Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35984-01 (Aug. 2, 2017) [hereinafter August 2017 DHS Waiver]; Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42829-02 (Sep. 12, 2017) [hereinafter September 2017 DHS Waiver]; Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 83 Fed. Reg. 3012-01 (Jan. 22, 2018) [hereinafter January 2018 DHS Waiver].

4. Lesley Evans Ogden, *Border Walls and Biodiversity: New Barriers, New Horizons*, 67 *BIOSCIENCE* 498, 500 (2017).

5. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-554 (1996) (codified as amended at scattered sections in 8 U.S.C.) [hereinafter IIRIRA].

6. *Id.*

7. Aaron D. Flesch et al., *Potential Effects of the United States-Mexico Border Fence on Wildlife*, 24 *CONSERVATION BIOLOGY* 171, 172 (2010).

ocelot, the jaguar, and the jaguarundi—have habitat that spans territory in both the U.S. and Mexico. Depending on where physical structures are built along the border, several protected areas in the border region would be affected, including Big Bend National Park and the Santa Ana National Wildlife Refuge in Texas.

Barriers interfere with wildlife's ability to move, even birds.<sup>8</sup> Species that are too large to pass through barriers or do not fly high are likely to be most directly affected.<sup>9</sup> Fragmented habitat is one of the most significant threats for wildlife, and for species who have populations on both sides of the border, the existence of a barrier restricting movement could have a concrete impact.<sup>10</sup> Not all species will react the same way and variation will depend on the specifics of their behavior, how dispersed their populations are, their genetic diversity and status, and the specific landscape in question.<sup>11</sup> Isolated, smaller populations have fewer food resources, limited breeding opportunities, and are more vulnerable. For example, the ocelot, currently listed as endangered throughout its range from the southern U.S. to northern Argentina and Uruguay, could suffer significantly from isolation from populations in Mexico, making it more susceptible to genetic impoverishment and random events.<sup>12</sup> Similarly, the desert bighorn sheep, which has small and highly fragmented populations, will likely lose connectivity, threatening the resilience of the species as local population extinctions are less likely to be reversible through contact with other local populations.<sup>13</sup>

Further, the impacts of a border wall on wildlife and the region's ecosystem go beyond the impact of a physical barrier barring wildlife from crossing the border.<sup>14</sup> The construction of the wall itself will disrupt habitat, as is evident from the DHS waivers that describe

the construction of roads and physical barriers (including, but not limited to, accessing the Project Area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and

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8. *Id.* at 177–79. The pygmy-owl, a nonmigratory bird that doesn't fly as high as some migratory birds, showed signs of decreased dispersal in corridors with high levels of disturbance. *Id.*

9. *Id.* at 179.

10. *Id.* (describing the desert bighorn sheep).

11. Jamie W. McCallum et al., *Conservation on International Boundaries: The Impact of Security Barriers on Selected Terrestrial Mammals in Four Protected Areas in Arizona, USA*, PLOS ONE, Apr. 2014, at 1, 8; Flesch et al., *supra* note 7, at 175–79 (studying movement patterns for the pygmy-owl and the desert bighorn sheep at the time of the first building of portions of border wall).

12. Endangered and Threatened Wildlife and Plants; Draft Ocelot (*Leopardus pardalis*) Recovery Plan, First Revision, 75 Fed. Reg. 52547-01 (Aug. 26, 2010) [hereinafter Draft Ocelot Recovery Plan].

13. Flesch et al., *supra* note 7, at 173, 179.

14. See Arie Trouwborst et al., *Border Fences and their Impacts on Large Carnivores, Large Herbivores and Biodiversity: An International Wildlife Law Perspective*, 25 REV. EUR. COMP. & INT'L ENVTL. L. 291, 293 (2016) (describing the various impacts border walls can have beyond serving as a physical barrier).

installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, and safety features) in the Project Area.<sup>15</sup>

Once the wall is built, there will be added security needs, in the form of heavy lighting and security patrols.<sup>16</sup> Both the building and increased security will require more roads and vehicles. As the Fish and Wildlife Service noted in 2010 when discussing the draft Ocelot recovery plan, “Issues associated with developing and patrolling the boundary between the United States and Mexico further exacerbate the isolation of Texas ocelots from those of Mexico.”<sup>17</sup>

#### THE LEGAL FRAMEWORK

The Endangered Species Act (ESA), under which several species in the region are listed, is supposed to protect against this kind of disturbance.<sup>18</sup> Article 7 of the ESA requires that any federal action, including any action funded or permitted by the federal government “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .”<sup>19</sup> Article 9 prohibits the taking of any listed species, with “take” defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>20</sup> Regulations define “harm” under the ESA to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>21</sup>

The National Environmental Policy Act (NEPA) should also be relevant here, since it requires an Environmental Impact Statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.”<sup>22</sup> NEPA does not require that a decision maker choose the least environmentally harmful option after preparing an EIS. However, it does require that the EIS contain certain elements, like a consideration of

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15. August 2017 DHS Waiver, *supra* note 3; September 2017 DHS Waiver, *supra* note 3; January 2018 DHS Waiver, *supra* note 3.

16. Trouwborst et al., *supra* note 14, at 293 (describing the common accessories of border walls around the world as including “roads, floodlights, human guards, dogs and landmines”).

17. Draft Ocelot Recovery Plan, *supra* note 12.

18. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544) [hereinafter ESA].

19. ESA § 7(a)(2) (codified at 16 U.S.C. § 1536(a)(2) (2012)).

20. ESA § 9(a)(1)(C) (codified at 16 U.S.C. § 1538(a)(1)(C) (2012)); ESA § 3(14) (codified at 16 U.S.C. 1532(19) (2012)).

21. 50 C.F.R. § 17.3 (2006). *See also* Babbitt v. Sweet Home Chapter, 515 U.S. 687, 707 (1995) (upholding this regulatory definition of “harm”).

22. National Environmental Policy Act of 1969 § 102(2)(C), Pub. L. No. 91-190, 82 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321, 42 U.S.C. § 4332(2)(C) (2012)) [hereinafter NEPA].

alternative projects<sup>23</sup> and different kinds of impact,<sup>24</sup> all designed to give decision makers information they might not otherwise have had with the goal of reducing overall environmental impact.<sup>25</sup>

The legal framework for environmental and natural resource protection is intended to prevent the kind of harm described above. However, under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as amended by subsequent legislation, “the Secretary of the Department of Homeland Security shall have the authority to waive all legal requirements” that the Secretary, in his or her “sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section,” effective upon publication of the waiver in the Federal Register.<sup>26</sup> The ability to waive all legal requirements means that Congress has authorized the DHS to waive any environmental statutes, whether federal or state, and thereby evade their mandates for environmental assessment and protection, including mandates under the ESA and NEPA.

Typically, immigration concerns would not override statutory requirements for environmental protections. However, since advocates of a border wall have framed the issue as one of national security, environmental protection has been treated as less significant than the need for a physical wall.

Following an executive order in January 2017 issued by President Donald Trump,<sup>27</sup> the DHS began plans to replace sections of wall and build prototypes, and issued waivers to allow this work to proceed. The Department has, since August 2017, now issued three waivers, waiving between thirty-six (in August 2017) and twenty-five (in January 2018) federal statutes.<sup>28</sup> The waivers include the ESA and NEPA, the Administrative Procedure Act, the Clean Water Act, the Migratory Bird Treaty Act, the Migratory Bird Conservation Act, and the National Wildlife Refuge System Improvement Act.<sup>29</sup> The waivers also include several statutes designed to protect the archeological and sacred resources of the United States and Native American groups, such as the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act,

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23. NEPA § 102(2)(C)(iii) (codified at 42 U.S.C. § 4332(2)(C)(iii) (2012)).

24. NEPA § 102(2)(C) (codified at 42 U.S.C. § 4332(2)(C) (2012)); 40 C.F.R. §§ 1502.16, 1508.7, 1508.8 (2018).

25. 40 C.F.R. § 1502.1 (2018).

26. IIRIRA, *supra* note 5, at 8 U.S.C. § 1103 note (2018).

27. Exec. Order No. 13767, 82 Fed. Reg. 8793 § 4(a) (Jan. 25, 2017).

28. See August 2017 DHS Waiver, *supra* note 3; September 2017 DHS Waiver, *supra* note 3; January 2018 DHS Waiver, *supra* note 3.

29. August 2017 DHS Waiver, *supra* note 3, at § 2; September 2017 DHS Waiver, *supra* note 3, at § 2; January 2018 DHS Waiver, *supra* note 3, at § 2.

and the American Indian Religious Freedom Act.<sup>30</sup> The waivers also include “all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of the statutes listed.”<sup>31</sup>

In addition to permitting waiver of environmental protections, the IIRIRA, as amended, prohibits any judicial review other than for constitutional claims.<sup>32</sup> In his opinion, Judge Curiel agreed to consider claims that the waivers had been *ultra vires*, but ultimately concluded that they were not *ultra vires* because the agency action did not contravene “clear and mandatory” statutory language.<sup>33</sup> The lawsuit also raised constitutional challenges, bringing up questions of whether the broad grant of waiver authority under IIRIRA violated the nondelegation doctrine and the separation of powers that allocates legislative authority to Congress, the power of the federal government to waive state law, and due process concerns raised by removing access to the courts. Judge Curiel rejected all of the constitutional challenges.<sup>34</sup> An appeal is likely, but will need to go directly to the Supreme Court under the terms of IIRIRA.<sup>35</sup>

#### LESSONS FOR WILDLIFE AND BIODIVERSITY ADVOCATES

Although border walls are not new historically, the latter part of the last century saw increasing emphasis in some regions on removing barriers and promoting transboundary cooperation for conservation.<sup>36</sup> In more recent years, concerns about immigration and national security have led to the fast construction of an increasing number of physical barriers, particularly in Europe and Eurasia.<sup>37</sup> Since the need for these physical barriers is now routinely framed as an issue of national security and environmental protection laws are waived to allow for quick construction, are there any lessons wildlife and biodiversity advocates can learn from the U.S. story beyond knowing that politics can trump law?

In domestic and international environmental law, much attention is given to procedural provisions, both in the form of environmental impact assessments (EIAs) and in the form of citizens’ rights to access infor-

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30. August 2017 DHS Waiver, *supra* note 3, at § 2; September 2017 DHS Waiver, *supra* note 3, at § 2; January 2018 DHS Waiver, *supra* note 3, at § 2. The Tohono O’Odham have around 62 miles of international border running through their territory and are opposed to a fortified border wall. *Issue Brief: The Tohono O’Odham National Opposes a “Border Wall,”* TOHONO O’ODHAM NATION, <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/Issue-Brief-Tohono-Oodham-Nation-Opposes-Border-Wall.pdf> (last visited Mar. 6, 2018).

31. August 2017 DHS Waiver, *supra* note 3, at § 2; September 2017 DHS Waiver, *supra* note 3, at § 2; January 2018 DHS Waiver, *supra* note 3, at § 2.

32. IIRIRA, *supra* note 5, at 8 U.S.C. § 1103 note (2018).

33. *In Re Border Infrastructure Envtl. Litig.*, No. 17CV1215-GPC(WVG), 2018 WL 1071702, at \*1, 8, 12 (S.D. Cal. Feb. 27, 2018).

34. *Id.* at \*26–40. More detailed discussion of these claims falls outside the scope of this article.

35. IIRIRA, *supra* note 5, at U.S.C. § 1103 note (2018).

36. John D.C. Linnell et al., *Border Security Fencing and Wildlife: The End of the Transboundary Paradigm in Eurasia?*, 14 PLOS BIOLOGY, Jun. 22, 2016, at 1–2; Trouwborst et al., *supra* note 14, at 291.

37. *Id.* at 2, 6–7.

mation and justice. Where political will is not sufficient to produce substantive protections for wildlife, procedure may be the next best thing, allowing for the public to know what is happening. The border wall story, unfortunately, shows how significant procedural protections are. The IIRIRA's removal of required formal consultation and environmental impact assessment significantly limits the ability of scientists and policy makers to ensure that border wall construction will not harm wildlife. The removal of access to justice by removing the ability to challenge the DHS waivers except on constitutional grounds removes a critical tool in efforts to hold agencies accountable.

The border wall story also suggests that procedure alone will not be enough to ensure environmental protection. Even without waiver of the EIA requirements, the waiver of substantive legislative obligations not to harm wildlife would significantly threaten the wildlife around the border. The waiver mechanism suggests that even hard-won substantive environmental protections, such as those contained in the ESA, can be overridden with shifting political will.

In the absence of political will for the kind of procedural and substantive laws that can help wildlife, wildlife advocates can also exercise short-term and long-term strategies to influence environmental outcomes. In the short-term, advocates should urge consultation, even if informal, and provide meaningful information to decision makers about the impacts of barriers on wildlife and options for mitigation. It is true that if the intent behind a physical barrier is complete impermeability, as is often the case for border walls, mitigation of the harms of the wall for the benefit of wildlife will be harder to achieve.<sup>38</sup> Nevertheless, some mitigation might be possible and could provide important benefits for wildlife.<sup>39</sup> Not all physical structures have the same effects.<sup>40</sup> Efforts during the first building phases of the U.S.–Mexico wall suggest that changes can be made to structures that can significantly mitigate impacts.<sup>41</sup>

To allow for mitigation, ongoing consultation with wildlife and biodiversity experts will be crucial. IIRIRA provides that in carrying out the section's provisions on fencing along the border, the Secretary

shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.<sup>42</sup>

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38. Trouwborst et al., *supra* note 14, at 292.

39. *Id.* at 296.

40. Linnell et al., *supra* note 36, at 7–8.

41. Ogden, *supra* note 4, at 500.

42. IIRIRA, *supra* note 5, 8 U.S.C. § 1103 note (2018).

In the lawsuit against the waivers, one group of plaintiffs argued that the waivers could not be granted before consultation.<sup>43</sup> However, Judge Curiel declined to find that this consultation had to be done before the waivers could come into effect and noted that some consultation had taken place.<sup>44</sup> Unfortunately, the consultation requirement will not be subject to judicial review in the way that ESA and NEPA requirements are, due to the restrictions on review in IIRIRA.<sup>45</sup> Nevertheless, the consultation requirement could be a valuable mechanism because it could allow the DHS to learn from conservation biologists about mitigation possibilities.

This might seem a disheartening conclusion, urging compromise and tweaking the details of a border wall while the biodiversity of several important regions is severely threatened. Certainly, consultation is not enough. Long-term strategies are also necessary. The U.S.–Mexico border wall debate suggests that intangible arguments about national security and immigration can trump concrete harms in a way that does not even allow for careful political discussion about the best way to balance the interests at stake. For wildlife and biodiversity advocates, then, a bigger lesson is about engagement. Scientists need to engage with lawyers and policy makers and all wildlife advocates need to continue efforts to engage in fields beyond wildlife biology and law. Wildlife advocates need to contribute to immigration and national security discussions in a meaningful way. And such advocates, both scientists and lawyers, need to engage in the political debate. Information is key, but it is not enough if it does not reach other audiences.

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43. *In re Border Infrastructure Envtl. Litig.*, No. 17CV1215-GPC(WVG), 2018 WL 1071702, at \*1, 19–22 (S.D. Cal. Feb. 27, 2018)

44. *Id.*

45. IIRIRA, *supra* note 5, 8 U.S.C. § 1103 note (2018).